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THE FIFTH AMENDMENT'S TAKINGS CLAUSE: PUBLIC USE AND PRIVATE USE; UNFORTUNATELY, THERE IS NO DIFFERENCE

*Emily L. Madueno**

The Takings Clause of the Fifth Amendment provides: “nor shall private property be taken for *public use*, without just compensation.”¹ The Supreme Court has incorporated the Takings Clause through the Due Process Clause of the Fourteenth Amendment to apply to the states.²

I. INTRODUCTION

Textually, the Takings Clause imposes two restrictions on the government’s use of eminent domain: just compensation and public use. Just compensation requires that the government pay the private owner for the property taken through eminent domain.³ The public use restriction circumscribes the very scope of the government’s eminent domain power because the government may only “compel an individual to forfeit her property for the *public’s* use, but not for the benefit of another private person.”⁴ The breadth of the definition

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1. U.S. CONST. amend. V (emphasis added).

2. See ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 497 (2001).

3. Just compensation “prevents the public from loading upon one individual more than his just share of the burdens of government” because “no one can be called upon to surrender or sacrifice his whole property . . . for the good of the community, without receiving a recompence [sic] in value.” *Kelo v. City of New London*, 545 U.S. 469, 497 (2005) (O’Connor, J., dissenting) (quoting *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 325 (1893)); *Vanhorne’s Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304, 310 (1795).

4. *Kelo*, 545 U.S. at 497.

of public use determines the extent of the government's power; a broader definition of public use expands the government's power to take private property.

Kelo v. City of New London contains the Supreme Court's most recent interpretation of public use. The Court's decision in *Kelo* generated uproar as if it restructured the Takings Clause.⁵ *Kelo* did not actually restructure the Takings Clause,⁶ but it did expand the government's power. The Court in *Kelo* enlarged the already broad definition of public use by holding that economic development per se, which does not eliminate public harm, is an acceptable public purpose.

To protect private property ownership, this Note suggests that the Court adopt a narrower definition of public use. The proper scope of a narrow public use definition requires actual use by the general public or public control of the private use; otherwise, the public use requirement ceases to restrict any taking. The Court should not so casually "eliminate liberties expressly enumerated in the Constitution,"⁷ as it appeared to do in *Kelo*.

To begin, Part II of this Note examines five categories and two theories of public use. Part III reviews public use's history, reflecting the categories and theories described in Part II. A discussion of *Kelo* in Part IV develops the fifth category described in Part II. The *Kelo* dissents in Part IV then shift this Note's focus from analyzing the development of public use jurisprudence to advocating for a narrower definition of public use. Part V explains the theory behind a narrower definition of public use, suggests where the Court ought to draw a line beyond which government may not take, and describes how advocates may go about effecting change. This Note concludes in Part VI by reiterating the need for a narrower definition

5. See, e.g., Benjamin Weyl, *Activist Tries a Grab for Jurist's Property*, L.A. TIMES, June 30, 2005, at A10 (discussing a citizen's response to *Kelo* that proposed that a New Hampshire town seize Justice Souter's home through eminent domain to build the "Lost Liberty Hotel").

6. The majority and dissent agree that *Kelo* followed precedent because it defined public use as public purpose, as precedent had defined public use. Compare *Kelo*, 545 U.S. at 479 (majority opinion) ("[The] Court long ago rejected any literal requirement that condemned property be put into use for the general public." (quoting *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 244 (1984))), with *id.* at 506 (Thomas, J., dissenting) ("Today's decision is simply the latest in a string of our cases construing the Public Use Clause to be a virtual nullity, without the slightest nod to its original meaning.").

7. *Id.* at 506 (Thomas, J., dissenting).

of public use and highlighting suggestions as to how to narrow the definition.

II. BACKGROUND: FIVE CATEGORIES AND TWO THEORIES

As defined by the Court, public use can be classified into several categories. These categories include: 1) use by the public through government use; 2) actual use by the public; 3) transfer to a private party for actual use by the public; 4) direct public benefit or purpose without actual use by the public; and 5) indirect public benefit or purpose (to realize a benefit or purpose in the future) without actual use by the public.

The categories fit within one of two public use theories: the actual-use (traditional) theory and the public-benefit (contemporary) theory. Specifically, categories one and two are consistent with the actual-use theory, while categories four and five are consistent with the public-benefit theory. Category three satisfies characteristics of both the actual-use and public-benefit theories, thus connecting the first two and last two categories.

Until the mid-twentieth century, the U.S. Supreme Court generally maintained a traditional interpretation of public use consistent with the actual-use theory.⁸ The actual-use theory requires that the general public be free to actually use the taken property⁹ (e.g., highways and railways). These takings might be, in some cases, the transfer of land from private owner A to a private railway company B; however, the taking always benefits the public as a whole by allowing the entire public to use the seized property.

The first category—use by the public through government use—is actual use of the taken property by the government as the public’s representative, such as an air force base. The second category, actual use by the public, is just that: the public, as individuals, may actually use the property. Roads and public parks are examples of the second category.

8. See *infra* Part III.A.

9. Nathan Alexander Sales, *Classical Republicanism and the Fifth Amendment’s “Public Use” Requirement*, 49 DUKE L.J. 339, 345 (1999).

As early as the 1830s when state governments¹⁰ began taking private property for railroads, the third category spurred a departure from the more traditional public use definitions of categories one and two.¹¹ This continued through the early twentieth century with public utilities.¹² In the third category, the government does not retain title to the taken property, but instead, transfers it to a private party who will make the property available for actual use by the public.

Building on the railroad and public utility cases, the fourth and fifth public use categories are contemporary definitions of public use consistent with the public-benefit theory. Under the public-benefit theory, public use is synonymous with public advantage,¹³ where public advantage means a public benefit or public purpose. Courts defer to legislatures' definitions of public advantage under the public-benefit theory.¹⁴

The fourth category focuses on the direct public benefit or purpose generated by the taking, since there is no actual use of the property by the public. Category four cases involve a taking to eliminate some public harm, such as blight, although the taking may include non-offending property if located within a blighted area.¹⁵

Following closely from the fourth category, the fifth category also lacks actual use by the public; however, category five differs slightly through its focus on the taking's indirect public benefit or purpose. Unlike direct public benefit or purpose, a taking justified by indirect public benefit or purpose eliminates no harm and guarantees no public benefit. Public-purpose takings include taking property for redevelopment or economic development. The taking includes *no* offending property. This is the type of taking the Supreme Court upheld in *Kelo*.

10. "Governments" refer to state governments only and not the federal government, which did not begin to use its eminent domain power until the late nineteenth century. *Kelo*, 545 U.S. at 511-12. The states acted under their own public use limitations rather than the federal Takings Clause because the Takings Clause did not apply to the states until after ratification of the Fourteenth Amendment. *Id.* at 512.

11. *E.g.*, *Beekman v. Saratoga & Schenectady R.R.*, 3 Paige Ch. 45 (N.Y. Ch. 1831).

12. *E.g.*, *Mt. Vernon-Woodberry Cotton Duck Co. v. Ala. Interstate Power Co.*, 240 U.S. 30 (1916); see discussion *infra* Parts III.A.3, III.B-C.

13. *Sales*, *supra* note 9, at 347-48.

14. See *Kelo*, 545 U.S. at 514.

15. See, *e.g.*, *Berman v. Parker*, 348 U.S. 26 (1954).

Categories four and five have all but eliminated the public use requirement from the Takings Clause through their broad definition of public use and deference to the legislature's decision of what is "public use." Where categories four and five make public use synonymous with public advantage, public use becomes all-encompassing. The Court's broad definition eviscerates the distinction between public and non-public uses by creating a broad range of private uses that are said to qualify as public without requiring any actual use or control by the public.

The next section explores how the Court gradually eviscerated the distinction between public and non-public uses as it developed the case law of public use under categories one through four existing before *Kelo*.

III. LAYING THE FOUNDATION: DEVELOPMENT OF PUBLIC USE REQUIREMENT JURISPRUDENCE LEADING TO THE COURT'S CURRENT POSITION ON PUBLIC USE

Public use jurisprudence before *Kelo* spanned four categories and included both theories. This section first follows the development of public use under the actual-use theory, as it describes categories one through three. The railroad and public utility cases shift this section's focus to the public-benefit theory. This section concludes with the development of public use through 2005 under the public-benefit theory, with discussions of *Berman v. Parker* and *Berman's* progeny.

A. The Actual-Use Theory

The actual-use theory requires that the government or general public actually use the taken property¹⁶ (e.g., military installations, highways, railways, and public utilities). Categories one, two, and three of public use fall under the actual-use theory. Next this Note describes categories one, two, and three in detail and explains the characteristics of the actual-use theory.

1. Category One: The Fort

At its narrowest (category one), the actual-use theory only includes "direct use by the government itself through its officers, and

16. See Sales, *supra* note 9, at 345–46.

for the purposes of the government as a political being—as in cases of . . . the taking of lands for forts, light-houses, [and] dock-yards.”¹⁷ Under this form of actual use, the public uses the property through government ownership in the name of the public. In these cases, the government retains ownership and uses the taken property in the name of the general public, while the general public as individuals may not be allowed to use the military installation.¹⁸

In the first category, the taking does not involve actual use by the general public because private citizens cannot physically access the property. The fact that the general public cannot physically access the taken property, however, does not make its use any less public. If for example, the government owns an air force base in the name of the public, which provides the public with national defense, then the government retains ownership and does not transfer the taken property to a private party who will provide the public benefit. This is unlike typical public-benefit takings. The public actually uses the taken property through its representatives acting in the name of the people.

2. Category Two: The Road

Second, actual use includes property taken and held by the government for actual use by the general public. Public roads are an example of category two. The government retains ownership of the road in the name of the general public, but unlike the first category of public use, individual members of the general public may actually use the road.¹⁹

Together, the first and second categories of public use delineate the actual-use theory as the crucial characteristic of public ownership without any transfer to a private party. For example, in one of the earliest applications of the actual-use theory, a New York court upheld part of a taking that would be put to public use as a street

17. *Bloodgood v. Mohawk & Hudson R.R.*, 18 Wend. 9, 59 (N.Y. Sup. Ct. 1837) (Tracy, Sen., concurring). “The Court for the Correction of Errors, New York’s highest tribunal at the time, was ‘a complicated amalgam of the state’s Chancellor, the Justices of the Supreme Court, and the 32 members of the state senate.’” Sales, *supra* note 9, at 347 n.32 (quoting Paul Finkelman, *Sorting Out Prigg v. Pennsylvania*, 24 RUTGERS L.J. 605, 625 n.100 (1993)).

18. See *Bloodgood*, 18 Wend. at 59.

19. See *id.* at 59–60.

while rejecting part of the taking that would be put to private use.²⁰ In construing the public-use requirement, the court explained that “[t]he Constitution, by authorizing the appropriation of private property to public use, impliedly declares, that, for any other use, private property shall not be taken from one and applied to the private use of another.”²¹ Then railroads arose, however, and expanded the definition of public use with the introduction of the public-benefit theory.

3. Category Three: The Railroad and the Power Plant

The third category of public use developed during the nineteenth century’s period of extraordinary economic growth as a means of fostering transportation and industrialization.²² This category represents actual use at its broadest because the government does not retain ownership of the taken property. Instead, the government takes private property and transfers it to another private party who will make it available for use by the general public. Alternatively, when authorized by statute, a private party may take the property directly without the government acting as a middleman.²³ Railroads and public utilities are examples of category-three takings. The private railroad company is the owner and primary user of the taken property. The public, however, retains the right to use the taken property by riding a train run by the railroad or by transporting goods via the railroad, which acts as a common carrier.

B. The Railroad and Public Utility Cases: The Actual-Use-Public-Benefit Connection

Although the railroad and public utility cases fit into the actual-use theory, they weaken the actual-use theory and signal a pivotal point in public-use jurisprudence. Category three extends the first two categories of public use because apart from any public use, these uses also confer a substantial private monetary benefit. The private-

20. See *In re Albany St.*, 11 Wend. 149, 151–52 (N.Y. Sup. Ct. 1834). The New York Court construed the public use requirement in its own constitution, which contained text identical to the public use requirement in the federal Constitution. Sales, *supra* note 9, at 339 n.3.

21. *Albany St.*, 11 Wend. at 151.

22. See Laura Mansnerus, Note, *Public Use, Private Use, and Judicial Review in Eminent Domain*, 58 N.Y.U. L. REV. 409, 413 (1983).

23. See, e.g., *Clark v. Nash*, 198 U.S. 361, 370 (1905); *Linggi v. Garovotti*, 286 P.2d 15 (Cal. 1955).

party transfer is justified under the actual-use theory because though the private party may benefit, it will make the property available for actual use by the general public. However, the public cannot use all of the taken property now owned by the private party.²⁴

The railroad and public utility cases also fall under the public-benefit theory. The private party provides the public a benefit through the private party's ownership. The public accepts this tradeoff because the private party can maximize the benefits derived from the property for the public, which public ownership could not accomplish as efficiently or, perhaps, at all.

As early as 1831, in *Beekman v. Saratoga and Schenectady R.R.*, New York's highest court of equity held that the New York Constitution's public use provision allowed government to transfer the private property of A to private railroad company B for the purpose of B building railroad lines.²⁵ The public would actually use the property through the railroad company's services; however, the court specifically focused on the railroad as a public improvement providing the public a benefit.²⁶

In this case the court explicitly acknowledged the soundness of a transfer of property to a private party to produce public benefit.²⁷ The court also deferred to the legislature to determine whether the public benefit derived was sufficient to justify taking an individual's private property.²⁸ Although early in the development of public use, for a court to depart from actual-use categories, the court cautiously made clear "[t]he right of eminent domain does not . . . imply a right in the sovereign power to take the property of one citizen and transfer it to another . . . where the public interest will be in no way promoted by such transfer."²⁹

24. For example, railroad tracks, yards, and maintenance facilities are fenced in and usually have signs posted indicating private property and warning trespassers away.

25. See *Beekman v. Saratoga & Schenectady R.R.*, 3 Paige Ch. 45, 71-72 (N.Y. Ch. 1831). The New York court construed the public use requirement in its own constitution, which contained text identical to the public use requirement in the federal Constitution. Compare N.Y. CONST. of 1821, art. 7, § 7, with U.S. CONST. amend. V.

26. *Beekman*, 3 Paige Ch. at 73-75.

27. See *id.*

28. *Id.* at 73.

29. *Id.*

C. *Switching Tracks: The Public-Benefit Theory*

In the early to mid-twentieth century, the actual-use theory weakened further as it gave way to the public-benefit theory.³⁰ The public-benefit theory gained strength due to the Court's focus on the public benefit derived from the taken property instead of the property's actual use.³¹ However, public use often retained the actual-use theory's principles of universality and equality of access, though the principles applied to benefit rather than access.³² The railroad or public utility of category three provides a public benefit (through public improvement, transportation, and services), which only *partially* justifies category three takings. Category four and five takings create public benefits (through blight removal and economic development), and the resulting public benefit *solely* justifies category four and five takings.

An actual-use-theory taking might transfer property from private owner A to a private railway company B; however, the taking always benefits the public as a whole by allowing a taking only if the entire public can actually use the seized property. The difference between actual use and public benefit is a fine line because all actual uses are public benefits. The difficulty lies in determining public benefits that qualify as actual uses by the public.

In *Mt. Vernon-Woodberry Cotton Duck Co. v. Alabama Interstate Power Co.*, for example, the Court upheld the taking of private property by a state-licensed power company, authorized by the state to exercise its power of eminent domain, to build a power plant.³³ The company would build a power plant on the taken land and, with that plant, produce power for public consumption. Private citizens of the general public could not actually use the *Cotton Duck* power plant in the way the public uses a road; however, the general public actually used and benefited from the power plant. The public used the plant (through the utility company) to provide itself power.³⁴

30. See Mansnerus, *supra* note 22, at 413.

31. See *id.*

32. Sales, *supra* note 9, at 346.

33. 240 U.S. 30, 32 (1916).

34. See *id.* ("[T]o gather the streams from waste and to draw from them energy . . . and so to save mankind from toil that it can be spared, is to supply what, next to intellect, is the very foundation of all our achievements and all our welfare. If that is not public we should be at a loss to say what is.").

Although *Cotton Duck* is a category three case justified by actual use and public benefit, the *Cotton Duck* Court heralded the end of the actual-use theory when it explicitly proclaimed that “[t]he inadequacy of use by the general public as a universal test is established.”³⁵

D. A New Definition for Public Use: Berman v. Parker and the Beginning of the Public-Benefit Theory in 1954

The public-benefit theory represents an expansion of public use, beyond that of the railroad cases because it only requires a benefit to some portion of the public instead of actual use by the public, or even a benefit to the general public at large.³⁶ Public use merely requires that some portion of the public be a clear beneficiary of the taking.³⁷ Expansion of public use, along with greater deference for legislative bodies, gained strength through the demise of economic substantive due process in the 1930s and 1940s³⁸ and the drive for urban renewal of the 1940s and 1950s.³⁹ However, the public-benefit theory actually emerged with the railroad cases. The railroad and public utility cases serve as the cross-ties between the actual-use theory and the public-benefit theory.⁴⁰ Through its category three precedent, the Court laid down track to the public-benefit theory and in 1954 the Court drove in the golden spike with *Berman v. Parker* and *Berman*’s progeny, including *Hawaii Housing Authority v. Midkiff* and *Ruckelshaus v. Mervin*.

1. *Berman v. Parker* Removed Blight and More

Berman and its progeny represent category four. Category four arises when private property is taken and the public no longer

35. *Id.*

36. Sales, *supra* note 9, at 347 (citing Lawrence Berger, *The Public Use Requirement in Eminent Domain*, 57 OR. L. REV. 203, 205 (1978)).

37. Steven E. Buckingham, Comment, *The Kelo Threshold: Private Property and Public Use Reconsidered*, 39 U. RICH. L. REV. 1279, 1298 (2005) (discussing *Mt. Vernon-Woodberry Cotton Duck Co. v. Ala. Interstate Power Co.*, 240 U.S. 30 (1916)).

38. The demise of economic substantive due process parallels the concurrent expansion of public use. Both involve the Court showing greater deference to legislative bodies and retracting economic liberties (i.e., freedom of contract and protection of private property interests). Compare *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), with *Berman v. Parker*, 348 U.S. 26 (1954).

39. Mansnerus, *supra* note 22, at 415.

40. See *supra* Parts III.A.3, III.B–C.

actually uses the property. Instead, a direct public benefit or purpose satisfies the public-use requirement for the taking. Under category four, judicial review of the public use also declines. Through *Berman*, the Court expanded the scope of public use (to the fourth category) while at the same time contracting the scope of judicial review of public use.

In *Berman* the Court dealt with a plan for the District of Columbia designed to transform a blighted neighborhood.⁴¹ However, the taking at issue included non-blighted property (plaintiff's store) within the blighted neighborhood.⁴² The *Berman* Court upheld the taking of plaintiff's non-blighted store based on a valid public use: a direct public benefit of removing blight from a neighborhood.⁴³ The Court also found that the taking of plaintiff's non-blighted store was rationally related to the valid public purpose of blight removal.⁴⁴ To support its specified direct public purpose, Congress found that "conditions existing in the District of Columbia with respect to substandard housing and blighted areas, including the use of buildings in alleys as dwellings for human habitation, are injurious to the public health, safety, morals, and welfare"⁴⁵

Berman equated the government's power of eminent domain with the police power—the government's traditionally-held ill-defined power to act for the public health, safety, welfare, and morals.⁴⁶ Where public use is coterminous with the police power, the Court grants government incredible power to take private property:

Once the object is within the authority of Congress, the right to realize it through the exercise of eminent domain is clear. For the power of eminent domain is merely the means to the end. . . . Once the object is within the authority of Congress, the means by which it will be attained is also for Congress to determine.⁴⁷

41. *Berman*, 348 U.S. at 29.

42. *Id.* at 31.

43. *See id.* at 36.

44. *See id.* at 33–35.

45. *Id.* at 28.

46. *See id.* at 32 ("We deal . . . with what traditionally has been known as the police power.").

47. *Id.* at 33 (citations omitted).

Therefore, the only question before the Court was whether the government exercised eminent domain within the scope of its police power.⁴⁸

Arguably, all governmental action is designed to serve some public purpose. Therefore, the Court's focus in eminent domain cases during the category four period is on the level of scrutiny applied to determine whether the condemnor acted within its constitutional scope of power.⁴⁹ When the Court defined public use according to the scope of the legislature's police powers, it implicitly granted the legislature enormous power to establish public use through an identifiable direct public purpose. However, the *Berman* Court went further. In *Berman*, the Court explicitly proclaimed its deference to legislatures and reserved for itself minimal reviewing power:

Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. . . . [T]he legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation The role of the judiciary in determining whether that power is being exercised for a public purpose is an extremely narrow one.⁵⁰

The Court followed its "deference to the legislature" mantra when it upheld the taking of plaintiff's store. The store was not itself blighted though it existed within the blighted neighborhood.⁵¹ The Court nonetheless concluded that plaintiff's non-blighted store posed no barrier to a taking because "[o]nce the question of the public purpose has been decided, the amount and character of land to be taken for the project and the need for a particular tract to complete the integrated plan rests in the discretion of the legislative branch."⁵²

After *Berman*, public use no longer requires government ownership of the taken property (a military installation), direct actual use by the public (a public road), or indirect actual use by the public (a railroad or power plant). Under the category four and *Berman*, public use merely requires a direct public benefit (blight removal).

48. *See id.* at 32–33.

49. *See Sales, supra* note 9, at 348.

50. *Berman*, 348 U.S. at 32 (citations omitted).

51. *Id.* at 31.

52. *Id.* at 35–36.

2. *Berman's Progeny*

Thirty years after *Berman*, the Court affirmed its holding in two cases—*Hawaii Housing Authority v. Midkiff* and *Ruckelshaus v. Monsanto Co.*—and added to the definition of public use two more acceptable direct public purposes.⁵³

a. *Government's paradise*

In *Midkiff*, the Court dealt with an oligopoly of Hawaiian land ownership.⁵⁴ Hawaii enacted legislation empowering itself to condemn tracts of land to redistribute the land and end the oligopoly.⁵⁵ As the Court noted, the Hawaiian legislature pursued condemnation and redistribution after concluding that “concentrated land ownership was responsible for skewing the State’s residential fee simple market, inflating land prices, and injuring the public tranquility and welfare.”⁵⁶ In support of its holding, the Court quoted from *Berman* extensively and concluded “[t]he ‘public use’ requirement is thus coterminous with the scope of a sovereign’s police powers.”⁵⁷ The Court upheld the taking as within the state’s police power to regulate land oligopoly and its associated evils, as documented by the legislature.⁵⁸

As the Ninth Circuit explained, the *Midkiff* taking appeared to be “a naked attempt on the part of the state of Hawaii to take the private property of A and transfer it to B solely for B’s private use and benefit” because the property was transferred from private party A directly to private party B without government possession of the property at any point.⁵⁹ In response to the appellate court, the Supreme Court rejected any requirement that condemned property be used by the general public.⁶⁰ The Court made clear that “[i]t is not essential that the entire community, nor even any considerable

53. *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984).

54. *See Midkiff*, 467 U.S. at 232. Land ownership consisted of seventy-two private landowners owning forty-seven percent of Hawaii’s land and the government (state and federal) owning about forty-nine percent. *Id.*

55. *See id.* at 233–34.

56. *Id.* at 232.

57. *Id.* at 239–40.

58. *See id.* at 241.

59. *Id.* at 235 (quoting *Midkiff v. Tom*, 702 F.2d 788, 798 (9th Cir. 1983)).

60. *Id.* at 244.

portion, . . . directly enjoy or participate in any improvement in order [for it] to constitute a public use.”⁶¹

b. Eminent domain for enhanced competition

Ruckelshaus involved a federal law allowing the Environmental Protection Agency to consider data submitted by one pesticide manufacturer in its application for a license to sell pesticides when reviewing another manufacturer’s license application.⁶² After submitting vulnerable data to the EPA, plaintiff pesticide manufacturer argued that the federal law constituted a taking for private use of the manufacturer’s submitted data.⁶³ Under the federal law, the government facilitated the transfer of private property (research data) from private party *A* to private party *B* where the most direct beneficiary was private party *B* and not the public.⁶⁴

Midkiff upheld a direct private-to-private transfer forced by the government for a direct public purpose.⁶⁵ The *Ruckelshaus* Court echoed *Midkiff* and “rejected the notion that a use is a public use only if the property taken is put to use for the general public.”⁶⁶ A taking constitutes a constitutional taking for public use if the taking possesses “a conceivable public character,” which is satisfied where the legislature finds a public purpose.⁶⁷ Essentially, in *Ruckelshaus* the Court held that increased competition in the pesticide market was a valid direct public purpose justifying the taking.⁶⁸

IV. ENTER *KELO V. CITY OF NEW LONDON* IN 2005: THE ICING ON THE PUBLIC-BENEFIT THEORY CAKE

Kelo contains the Supreme Court’s most recent interpretation of public use. The *Kelo* Court expanded the already broad definition of

61. *Id.* (quoting *Rindge Co. v. County of Los Angeles*, 262 U.S. 700, 707 (1923)).

62. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 992 (1984). The manufacturer’s data was only used where the other manufacturer offered to compensate the first whose data the EPA considered. *Id.*

63. *Id.* at 999.

64. With *A*’s data, *B* benefited because *B* did not have to replicate the complex research that *A* had performed.

65. See *Midkiff*, 467 U.S. at 233–34, 241.

66. *Ruckelshaus*, 467 U.S. at 1014 (citing *Midkiff*, 467 U.S. at 243–44).

67. See *id.* at 1014–15.

68. *Id.* at 1015 (explaining that the data-consideration provision eliminated barriers to entry into the pesticide market by obviating duplicative, costly research and by streamlining the application process for licenses to sell pesticides).

public use to category five when a slim majority held that economic development qualifies as public use. Public use under *Kelo* only requires that the taking be for an indirect public benefit—redevelopment or economic development. To understand the breadth of public use under category five, one must understand that nearly all governmental actions are capable of indirectly benefiting the public; otherwise, such actions would be irrational and would not withstand the most limited judicial review.

A direct public benefit (category four), such as blight removal, differs from an indirect public benefit (category five), such as a redevelopment plan, because the public reaps the benefit of blight removal directly by condemning the offending property. On the other hand, with a redevelopment plan, the public only reaps a benefit through the effects of redevelopment, assuming they are realized, and not through the taking itself.

This section discusses *Kelo* in detail, including its factual background, the majority's holding that economic development qualifies as a public use, and the majority's deference to legislatures and municipal administrators. The *Kelo* section then transitions this Note from explanation to advocacy, using the dissents of Justices O'Connor and Thomas.

A. Factual Background

Several plaintiffs challenged the power of eminent domain exercised by the city of New London, Connecticut, which threatened to take plaintiffs' treasured private properties.⁶⁹ The city never alleged plaintiffs' properties were blighted or warranted condemnation.⁷⁰ Instead, plaintiffs' properties "were condemned only because they happen[ed] to be located in the development area" the city planned to use for urban revitalization.⁷¹

In 1990, a Connecticut agency designated New London a distressed municipality.⁷² In response to economically depressed conditions, New London officials focused on a plan for economic revitalization to capitalize on the building of Pfizer's new research facility and reactivated the private New London Development

69. *Kelo v. City of New London*, 545 U.S. 469, 475 (2005).

70. *Id.*

71. *Id.*

72. *Id.* at 473.

Corporation ("NLDC," also a defendant) to assist city officials with the city's economic development.⁷³ The city authorized NLDC to purchase property from willing owners and to take property from unwilling owners through eminent domain in the city's name.⁷⁴ The city expected NLDC's economic development plan to create new jobs, generate higher tax revenue, make New London more attractive, and create leisure opportunities through a riverwalk with restaurants and shopping, marinas, a park, and a museum.⁷⁵

Plaintiffs' challenge requested injunctive relief to prevent the city from taking their homes.⁷⁶ Plaintiffs sought injunctive relief rather than just compensation because plaintiffs wanted to remain in their homes.⁷⁷ The request for injunctive relief framed the issue as whether New London's economic development plan fell within the meaning of public use.⁷⁸

B. The Supreme Court Decided

The *Kelo* majority allowed the takings when it held that economic development qualifies as a public use under the federal Constitution. As part of its expansion of the definition of public use, the majority also expressed its deference to legislatures and municipal administrators on the question of public use.

1. Economic Development is a Public Use

In a five-to-four decision, a majority of the Court affirmed fifty years of public use precedent and expanded that precedent when it included economic development within the meaning of public use. Writing for the majority, Justice Stevens began the Court's reasoning with two well-established takings principles:

[T]he sovereign may not take the property of *A* for the *sole* purpose of transferring it to another private party *B*, even though *A* is paid just compensation. . . . [I]t is equally clear that a State may transfer property from one private party to

73. *Id.* at 473–74.

74. *Id.* at 475.

75. *Id.* at 474–75.

76. *Kelo v. City of New London*, No. 557299, 2002 Conn. Super. LEXIS 789, at *1 (Conn. Super. Ct. Mar. 13, 2002).

77. *Id.*

78. *Kelo*, 545 U.S. at 477.

another if future “use by the public” is the purpose of the taking⁷⁹

Justice Stevens found that New London’s economic development plan did not violate the first principle because the city did not design the plan to benefit a particular private group or individual under the guise of an asserted public purpose or otherwise.⁸⁰

The economic development plan seemed to violate the second principle because the city did not plan to open all of the condemned land to use by the general public.⁸¹ Also, the city did not require private lessees to make their services available to the general public, as is the case with common carriers.⁸² However, Justice Stevens solved this problem for New London because he explained that the Court abandoned requiring a literal, strict and narrow reading of the second principle of actual use by the general public.⁸³

Although the Court did not require a showing of actual use by the general public to satisfy the second principle of ‘use by the public,’ the Court argued that it still required satisfaction of its second principle.⁸⁴ A showing of public purpose can satisfy the second principle.⁸⁵ For the majority, requiring a public purpose was merely a difference of degree within its ‘use by the public’ principle in that when a taking is for a stated public purpose, this is a type of use by the public.

After identifying and considering the takings principles, the Court asked whether New London’s economic development plan served a public purpose to determine whether it was a valid public use.⁸⁶ Justice Stevens addressed this question by considering how

79. *Id.* (emphasis added). Justice Stevens used “sole” and cited no authority for these propositions. Compare his language to the language Justice O’Connor relied on from Justice Chase, where “sole” was absent. This indicates that for the dissent, if any of the sovereign’s purposes is to transfer property of *A* to a private party *B*, then that runs afoul of the public use requirement. See *infra* text accompanying notes 102–06.

80. *Kelo*, 545 U.S. at 477–78.

81. *Id.* at 478.

82. *Id.*

83. *Id.* at 479.

84. See *id.* at 477–80.

85. *Id.* at 480.

86. *Id.*

the Court defined public purpose and looked to *Berman*, *Midkiff*, and *Ruckelshaus* for guidance.⁸⁷

By comparing precedent, Justice Stevens found that New London's plan served the valid public purpose of economic development, including new jobs and increased tax revenues.⁸⁸ Justice Stevens emphasized that the Court could not distinguish economic development from the way that the Court defined public use in its precedent because the Court maintained a broad understanding of public use.⁸⁹ Though finding a public purpose of economic development where no blight existed goes beyond the Court's holding in *Berman*, Justice Stevens framed *Berman*'s holding in a way that tends to lessen the distinction between *Berman* and *Kelo* discussed by the dissent.⁹⁰

Justice Stevens explained that *Berman*'s public use was more than removing blight—the public use the Court recognized in *Berman* was the transformation of a neighborhood through redevelopment.⁹¹ For Justice Stevens, the *Berman* Court focused on the improvements made by the city through the taking.⁹² The valid public use in *Berman* seemed to be improvement for improvement's sake. The majority construed precedent with a focus on improvements made by the city through the taking to address the dissent because *Kelo* only involved improvement for improvement's sake as New London was not addressing problematic properties by taking plaintiffs' non-blighted homes and businesses. As improvement for improvement's sake, *Kelo*'s economic development for a portion of New London was comparable to *Berman*'s redevelopment of a neighborhood because both focused on improvement of an area.

The majority also focused heavily on *Kelo*'s facts—a distressed municipality that suffered years of economic decline and an unemployment rate nearly double that of the state.⁹³ The majority

87. *Id.* at 480–83. See generally discussion *supra* Part III.D (discussing *Berman v. Parker*, 348 U.S. 26 (1954), *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984), and *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984)).

88. *Kelo*, 545 U.S. at 483–84.

89. *Id.* at 484–85.

90. See *infra* text accompanying notes 109–13.

91. *Kelo*, 545 U.S. at 484 & n.13.

92. See *id.* at 484 n.13.

93. *Id.* at 473.

did so to make its comparison to precedent tighter and to rebut Justice O'Connor's distinction in dissent between removing blight and removing perfectly fine homes.⁹⁴

Even without Justice Steven's crafted description of *Berman*, *Berman* provided the *Kelo* majority with some support. The owner's taken property in *Berman* was not blighted just as the *Kelo* plaintiffs' taken properties were not. Technically, that brought *Kelo* directly in line with *Berman*. *Berman* already provided the reasoning to support the rule that allowed the city to take non-blighted property: for the city's redevelopment plan to be effective, the city had to be able to take an entire blighted area as a whole, not on a piecemeal basis, including a piece that was not itself blighted.⁹⁵ *Berman*'s reasoning may support a taking of non-blighted property located within a blighted area; however, arguably it does not really support a taking of non-blighted property located within an area completely lacking blight.

Regardless of the argument that *Berman*'s reasoning does not support the taking of non-blighted property located within an area completely lacking blight, if the city's redevelopment plan required it, the Court will not question municipal authorities.

2. Legislatures (and Municipal Administrators) Reign Supreme

After finding that the takings by New London served a valid public purpose, the Court followed its precedent and applied reasonable relationship review to test New London's power to take plaintiffs' private properties.⁹⁶ Justice Stevens rejected the stricter reasonable certainty test, which required the Court to be reasonably certain that the anticipated public benefit would actually result from the taking.⁹⁷

Under the reasonable relationship test, the majority stated that the government had the power to take pursuant to a public purpose "[w]hen the legislature's purpose [was] legitimate and its means [were] not irrational"⁹⁸ Justice Stevens justified the reasonable

94. See *infra* text accompanying note 113.

95. *Berman v. Parker*, 348 U.S. 26, 35 (1954).

96. See *Kelo*, 545 U.S. at 487–89 (discussing *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984); *Berman*, 348 U.S. 26).

97. *Id.* at 487–88.

98. *Id.* at 488 (quoting *Midkiff*, 467 U.S. at 242).

relationship test by the reasoning that the Court should not second-guess a legislature's decisions about development plans because unlike legislative bodies, courts are institutionally limited in making decisions on matters such as the land needed for a development project and the efficacy of the project.⁹⁹

A practical problem with the reasonable certainty test was that it required the legal rights of all parties to be established through judicial approval of the plan before the city could implement the development plan.¹⁰⁰ However, judicial approval of the plan, based on a finding that the expected results are reasonably certain to occur, will almost never be met, and the plan will not be commenced because it lacks judicial approval.¹⁰¹

Unlike the majority, the dissents support a greater role for courts in reviewing takings cases.

C. A Unified Dissent of Four Suggests That There Is a Real Debate Still to Be Had on the Meaning of Public Use

Both Justice O'Connor and Justice Thomas dissented, arguing that economic development alone is not public use and that courts should have a more active role in reviewing takings. While Justice O'Connor's dissent focused on distinguishing *Kelo* and the Court's precedent, Justice Thomas's dissent called for a complete overhaul of public use jurisprudence based on the natural meaning of public use.

1. Justice O'Connor Dissented, Joined by
Chief Justice Rehnquist and Justices Scalia and Thomas

In her dissent joined by three other members of the Court, Justice O'Connor questioned the majority's holding by focusing on differences between the Court's precedent and *Kelo*. Justice O'Connor then criticized the majority for practically deleting the Court's role in reviewing takings.

a. Economic development alone is not public use

Justice O'Connor began her dissent with the same takings principle Justice Stevens chose as his first takings principle, though stated differently: "[A] law that takes property from A[] and gives it

99. *Id.* at 488–89 (citing *Berman*, 348 U.S. at 35–36).

100. *See id.* at 488.

101. *See id.*

to B: It is against all reason and justice, for a people to entrust a Legislature with such powers; and, therefore, it cannot be presumed that they have done it.”¹⁰² The dissent found New London’s economic development plan violated this principle in light of the Court’s precedent and charged the majority with violating the Takings Clause for holding otherwise.¹⁰³ Justice O’Connor clarified for the majority that the Court’s precedent recognized three categories of takings that comply with the principle shared by the majority and the dissent:

1) “the sovereign may transfer private property to public ownership—such as for a road, a hospital, or a military base;”¹⁰⁴

2) “the sovereign may transfer private property to private parties . . . who make the property available for the public’s use—such as with a railroad, a public utility, or a stadium;”¹⁰⁵ and

3) the sovereign may take private property to serve a public purpose even if the property is destined for private ownership, but only under certain circumstances.¹⁰⁶

The dissent agreed with the majority that *Kelo* presented a potential Justice O’Connor-category-three (public purpose) taking, but the dissent found that the circumstances presented in *Kelo* were not the circumstances recognized by two precedents cited by the majority that allowed valid takings.¹⁰⁷ The O’Connor dissent did not suggest overruling the majority’s key precedents (*Berman* and *Midkiff*).¹⁰⁸

Justice O’Connor distinguished *Kelo*’s facts from those of *Berman* and *Midkiff*.¹⁰⁹ *Kelo* included no finding of blight or any other affirmative harm to society through the pre-condemnation property.¹¹⁰ Both *Berman* and *Midkiff* involved pre-condemnation

102. *Id.* at 494 (O’Connor, J., dissenting) (quoting *Calder v. Bull* 3 U.S. (3 Dall.) 386, 388 (1798) (Chase, J.)).

103. *See id.* at 494, 497–500.

104. *Id.* at 497.

105. *Id.* at 498.

106. *Id.*

107. *See id.* at 498–501 (comparing the facts in *Kelo* to *Berman v. Parker*, 348 U.S. 26 (1954), and *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984)).

108. *See id.* at 498 (“We are guided by two precedents about the taking of real property by eminent domain.”).

109. *See id.* at 500–01.

110. *Id.*

uses that inflicted affirmative harm on society—a blighted neighborhood (*Berman*) and a land oligopoly's social and economic evils (*Midkiff*).¹¹¹ The sovereigns in *Berman* and *Midkiff* both realized a direct public benefit through the takings involved by eliminating the harmful condition posed by the property in its pre-condemnation state.¹¹² Eliminating harm to the public seemed to be the special circumstance Justice O'Connor would require for category three public purpose takings that she found lacking in *Kelo*. None of the taken property in *Kelo* was harmful: the city condemned plaintiff's non-offending, well-maintained homes.¹¹³ As a result, the majority jettisoned the *Berman* requirement that if the taking is not for actual use, the taking must eliminate harm.

b. Courts have a role, too

In examining *Berman* and *Midkiff*, Justice O'Connor discussed the role of the courts vis-à-vis legislatures.¹¹⁴ Although deference to the legislature and municipal administrators on the meaning of public purpose is important, Justice O'Connor emphasized that the Court must maintain a role, as both *Berman* and *Midkiff* held.¹¹⁵ That courts should have a role is not to say that courts should distrust legislatures or municipal administrators to determine public purposes simply because they will always find a purported public purpose to justify any action they may pursue.¹¹⁶ Rather, Justice O'Connor expressed the dissent's concern that a judicial check is necessary in the interpretation of public use if public use is to retain any meaning as a limitation on government's power.¹¹⁷ To square the judicial check for the courts with seemingly contradictory statements regarding the police power the Court made in *Berman* and *Midkiff*,

111. *Id.* at 500.

112. *Id.*

113. *Id.* at 500–01.

114. *See id.* at 499–500.

115. *Id.* at 500.

116. Municipal administrators are often corrupt, or at best, show favoritism toward their friends. *See* Patrick McGreevy, *Audit Targets Redevelopment Agency*, L.A. TIMES, Sept. 29, 2006, at B4; *see, e.g.*, Sw. Ill. Dev. Auth. (SWIDA) v. Nat'l City Envtl., L.L.C., 768 N.E.2d 1, 10 (Ill. 2002) ("SWIDA advertised that, for a fee, it would condemn land at the request of 'private developers' for the 'private use' of developers. . . . SWIDA entered into a contract with Gateway to condemn whatever land 'may be desired . . . by Gateway.' . . . It appears SWIDA's true intentions were to act as a default broker of land for Gateway's proposed parking plan.").

117. *Kelo*, 545 U.S. at 497.

Justice O'Connor designated the police power language in *Berman* and *Midkiff* as errant and unnecessary dicta.¹¹⁸ The police power and the power of eminent domain are quite distinct: the former is regulatory and the latter is acquisitory.

While Justice O'Connor advocates for a judicial check on political discretion, she fails to elaborate on the extent of the Court's role. Plaintiffs presented the argument that the Court ought to adopt the reasonable certainty test,¹¹⁹ which Justice O'Connor should have addressed so the dissent could have avoided criticizing the majority without offering a viable alternative.

2. Justice Thomas Dissented

a. Economic development alone is not public use

Though Justice Thomas joined Justice O'Connor's subtler dissent distinguishing *Kelo*'s facts from precedent relied on by the majority, Justice Thomas dissented separately waging an open attack on that precedent. His attack criticized precedent and the majority in following that precedent for their departure from the original and natural reading of the Takings Clause's public use requirement.¹²⁰ Justice Thomas focused on the constitutional text of 'public use.'

The text of the Takings Clause states "public use" and not public purpose;¹²¹ however, according to Justice Thomas, the majority's reasoning, "replace[d] the Public Use Clause with a '[P]ublic [P]urpose' Clause . . . or perhaps the 'Diverse and Always Evolving Needs of Society' Clause."¹²² Imbuing public use with a public purpose meaning rendered public use meaningless because public purpose served no other function than to state that the government may take property for public or private uses through eminent domain.¹²³ If public use means public purpose, public use in the

118. *Id.* at 501 ("We deal . . . with what traditionally has been known as the police power." (quoting *Berman v. Parker*, 348 U.S. 26, 32 (1954))); *id.* ("The 'public use' requirement is coterminous with the scope of a sovereign's police powers." (quoting *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 240 (1984))).

119. *Id.* at 487 (majority opinion).

120. *See id.* at 505–06 (Thomas, J., dissenting).

121. U.S. CONST. amend. V.

122. *Kelo*, 545 U.S. at 506 (citation omitted).

123. *Id.* at 507. If public use means public and private use, which are the only two possibilities of uses for which property may be taken, there would be no need to include 'public' in the Constitution's text. On the other hand, Justice Thomas is clear to explain that interpreting

Takings Clause replicates the inquiry appropriate under the Necessary and Proper Clause—whether the taking serves a valid public purpose.¹²⁴ Accordingly, defining public use by public purpose renders “public use” surplusage.¹²⁵ Justice Thomas explained that a constitutional interpretation rendering constitutional text surplus is unacceptable.¹²⁶

Instead, Justice Thomas advocated a natural reading of public use, based on a definition of ‘use’ as employ, which allowed government takings for government ownership or for private ownership where the public would have a legal right to use the taken property.¹²⁷ He reasoned that where the government transferred property from private party A to private party B, with possession by B, the public cannot be said to have any right to use the property.¹²⁸ The public did not have any right to the property despite incidental benefits the public enjoyed because the public cannot be said to be employing the property.¹²⁹

Justice Thomas’s reasoning based on the meaning of “use” as “employ” demonstrates the pivotal role of the category three railroad cases. Although the railroad cases involved government transfer of property from private party A to private railroad B, the possession by B involved both public benefit from the property and public employment of the property. The public can be said to be employing the property where it is owned by the railroad in that all members of the public can use the property as a railroad for transporting themselves or chattels.

public use only as public and not as private use does not mean that the Takings Clause distinguishes between those takings that require that the condemnor pay just compensation from those that do not require such payment. *Id.* To use the Takings Clause to distinguish between compensated and non-compensated takings would violate a bedrock principle well-established at the founding of the United States: *all* takings require that the condemnor pay compensation. *Id.* at 507–08 (citing WILLIAM BLACKSTONE, 1 COMMENTARIES *134–35; JAMES KENT, 2 COMMENTARIES *275; JAMES MADISON, *For the National Property Gazette* (Mar. 27, 1792), in 14 PAPERS OF JAMES MADISON 266, 267 (Robert A. Rutland et al. eds., 1983)).

124. *Id.* at 511. The Necessary and Proper Clause *grants* the government power to take to serve a public purpose, but at the same time, the Takings Clause *limits* the government’s acquisition power under the Necessary and Proper Clause to takings for use by the public. *See id.*

125. *Id.* at 507, 511.

126. *Id.* at 507 (“It cannot be presumed that any clause in the [C]onstitution is intended to be without effect.” (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803))).

127. *See id.* at 508–09.

128. *See id.* at 508.

129. *Id.*

Justice Thomas may be right about public purpose exceeding the meaning of public use if 'use' indeed means employ. However, why confine use to its narrow definition of employ rather than a broader definition such as convenience? To justify his limitation on 'use' to employ, Justice Thomas considered other occurrences of 'use' in the Constitution¹³⁰ and compared 'public use' to 'general welfare.'¹³¹

Despite Justice Thomas's logic that the Framers would have used broader language in the Takings Clause if they had meant something as sweeping as general welfare, the majority imbued public use with a sweeping meaning by equating public use (the scope of the power of eminent domain) with the police power.¹³² Justice Thomas denounced equating the power of eminent domain with the police power based on history of the two powers. Exercise of the police power typically required no compensation, whereas exercise of the power of eminent domain has always required the payment of compensation.¹³³ For example, Justice Thomas criticized the *Berman* Court because it unnecessarily expanded public use to mean public purpose to allow the legislature to deal with a blighted neighborhood.¹³⁴ According to Justice Thomas, the *Berman* Court did not need to expand public use to mean public purpose because state nuisance law through the state's police power provided an appropriate remedy to address a blighted neighborhood.¹³⁵

b. Courts have a role, too

Of all the provisions in the Bill of Rights, Justice Thomas wondered why the Court singled out public use to abdicate its duty to

130. Justice Thomas considered the occurrences of 'use' in Article I, § 8 and Article I, § 10, both of which employ 'use' in the narrower sense. *Id.* at 509; see U.S. CONST. art. I, § 8, cl. 12 ("Congress shall have the power . . . [t]o raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years."); *id.* art. I, § 10, cl. 2 ("[T]he net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States.").

131. Justice Thomas concluded that if the Framers wanted public use to mean something as broad as 'general welfare,' the Framers would have used such language for expressing that broader idea in place of 'public use.' *Kelo*, 545 U.S. at 509.

132. *See id.* at 519.

133. *Id.* at 519 (citing WILLIAM BLACKSTONE, 1 COMMENTARIES *134-35; JAMES KENT, 2 COMMENTARIES *275; JAMES MADISON, *For the National Property Gazette* (Mar. 27, 1792), in 14 PAPERS OF JAMES MADISON 266, 267 (Robert A. Rutland et al. eds., 1983)).

134. *See id.* at 519-20

135. *Id.*

say what the law is.¹³⁶ The Court, for example, did not defer to any legislative determination of what constitutes a reasonable search of a home.¹³⁷ Justice Thomas observed that under the Court's jurisprudence, "citizens are safe from the government in their homes, the homes themselves are not."¹³⁸ Justice Thomas further questioned why, if the Court did not defer to legislative judgment when the government only wanted to search a home, which the Court considered sacrosanct, the Court deferred to the legislative judgment when the government wanted to seize the home and tear it down.¹³⁹

To relieve Justice Thomas of his concern for how "seriously awry" the Court's interpretation of the Constitution has gone,¹⁴⁰ courts ought not abdicate their responsibility to determine what public use means, deferring entirely to the judgment of legislative bodies. In addition, when exercising their responsibility, courts should define public use more narrowly.

V. WHAT SHOULD PUBLIC USE MEAN?

Law and practice should follow theory. This section begins by explaining the theory behind a more narrow definition of public use. The section next describes the narrower definition of public use and states what it does and does not include. Finally, this section explores possible ways to bring about a narrower definition of public use, which include ratifying a constitutional amendment, persuading a majority of the Court to change its mind, and lobbying representative government.

A. Theory (*The Why*)

The Court ought to protect property rights because the Constitution contains several provisions for that very purpose. The Framers deemed property so important that they listed property with life and liberty in the Fifth Amendment's Due Process Clause.¹⁴¹ Property appears again in the Fourteenth Amendment's Due Process

136. *See id.* at 517–18.

137. *Id.* at 518 (citing *Payton v. New York*, 445 U.S. 573, 589–90 (1980)).

138. *Id.*

139. *Id.*

140. *Id.*

141. U.S. CONST. amend. V ("No person shall be . . . deprived of life, liberty, or property, without due process of law . . .").

Clause.¹⁴² The Takings Clause was the first provision of the Bill of Rights that the Court incorporated through the Fourteenth Amendment.¹⁴³ Given the many protections the Constitution extends to property rights, it follows that courts should protect property rights to a higher degree than they currently do.¹⁴⁴

Soon after the Fifth Amendment's ratification in 1795, Justice Patterson characterized eminent domain as the "despotic power," though necessary at times.¹⁴⁵ He further explained that "the right of acquiring and possessing property, and *having it protected*, is one of the natural, inherent, and unalienable rights of man."¹⁴⁶

The right to own, use, and freely dispose of one's property is an inalienable right of man.¹⁴⁷ The state does not grant property as a privilege; rather, property "is a right that exists apart from society and, indeed, exists before society."¹⁴⁸ The only justification for any limitation of private property rights, as with liberty, is the voluntary combination of people to form a government for the sake of protecting as much of those liberty interests as possible. Men agree to this social contract, government, because it is designed to safeguard their liberty and property against all others.¹⁴⁹ Our social contract is the Constitution.

When the Framers designed our government they provided for property's protection vis-à-vis government power in several ways,

142. *Id.* amend. XIV, § 1, cl. 3 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . .").

143. CHEMERINSKY, *supra* note 2, at 497.

144. For a review of the shameful degree of protection the Court currently extends to property rights, see Gideon Kanner, "[Un]equal Justice Under Law": *The Invidiously Disparate Treatment of American Property Owners in Taking Cases*, 41 LOY. L.A. L. REV. (forthcoming 2008).

145. *Vanhorne's Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304, 311 (1795).

146. *Id.* at 310 (emphasis added).

147. *Id.*; see also *City of Norwood v. Horney*, 110 Ohio St. 3d 353, 2006-Ohio-3799, 853 N.E.2d 1115, at ¶ 35 ("To be . . . protected and . . . secure in the possession of [one's] property is a right inalienable, a right which a written constitution may recognize or declare, but which existed independently of and before such recognition, and which no government can destroy." (quoting *Henry v. Dubuque Pac. R.R.*, 10 Iowa 540, 544 (1860))); Ayn Rand, *Man's Rights*, in *THE VIRTUE OF SELFISHNESS* 108, 110 (1964) ("The right to life is the source of all rights—and the right to property is their only implementation. Without property rights, no other rights are possible. Since man has to sustain his life by his own effort, the man who has no right to the product of his effort has no means to sustain his life.").

148. Buckingham, *supra* note 37, at 1294.

149. "Government is instituted no less for protection of the property than of the persons of individuals." THE FEDERALIST NO. 54, at 307 (James Madison) (Clinton Rossiter ed., 1961).

including through the Takings Clause of the Fifth Amendment.¹⁵⁰ The Takings Clause limits the government's power of eminent domain and protects "the security of Property," which Alexander Hamilton described to the Philadelphia Convention as one of the 'great ob[jects] of Gov[ernment].'"¹⁵¹ Through this clause, the Framers struck a balance between the individual's desire to form a government for the protection of his property and the powers of that government to sustain itself for its instituted purpose.¹⁵²

As with other liberty interests, property interests cannot be absolute no matter how vital to man's survival. An individual's liberty may be limited by joining together to form government for the sake of mutual benefit to all individuals. Similarly, a man's property interest may be limited. Public use in the Constitution defined the extent of that limitation on man's property interest.

Soon after ratification of the Fifth Amendment, Justice Chase identified the natural interpretation of public use.¹⁵³ Departure from the natural interpretation of public use leads down a slippery slope. Where public use is defined as public benefit and public purpose, and where public use is deemed coterminous with the police power, is there any limit on the government's power to take? There is nothing to stop the legislature from taking A's private property and giving it to B, in violation of the natural interpretation of public use, where B could make better use of it and provide a greater benefit to the public. Nothing limits the legislature's power to take when the Court has determined public benefit justifies the taking of private property.¹⁵⁴

The Court has refused to limit the legislature's power in another way. Whether a taking *actually* provides a public benefit does not matter when the Court abdicates its responsibility and allows the legislature to define its own powers.¹⁵⁵ The *Berman* Court provides

150. See U.S. CONST. amend. V.

151. *Kelo v. City of New London*, 545 U.S. 469, 496 (2005) (O'Connor, J., dissenting) (alteration in original) (quoting 1 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 302 (Max Farrand ed., 1911)).

152. Whether the Constitution struck the correct balance, it is the balance Americans use until and unless Americans amend it.

153. See *supra* note 102.

154. See *Bloodgood v. Mohawk & Hudson R.R.*, 18 Wend. 9, 61–62 (N.Y. Sup. Ct. 1837) (Tracy, Sen., concurring).

155. See *id.*

an example of its abdication when it declared: “Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive.”¹⁵⁶ With that statement, the *Berman* Court explicitly proclaimed its deference to legislatures and reserved for itself minimal power to review challenges under the Takings Clause.¹⁵⁷ Isn’t the public use requirement in the Takings Clause such a “specific constitutional limitation”?

When courts allow legislatures to define their own powers, courts betray the Framers’ carefully crafted system of government and abandon the Constitution because they thrust the legislature over the Constitution.

[T]o insist that the determination or expression by the Legislature that it is for the public interest and expedient in a particular case to exert the right of eminent domain, or the power of sovereignty, *ipso facto*, establishes that the power of sovereignty is rightfully exerted, is in effect to insist that the power of the Legislature is above the power of the Constitution [H]appily for us . . . the Legislature is not the creator or judge of its own powers; but is the creature of the Constitution, and all its acts must be in subordination to it.¹⁵⁸

When the Court departs from our constitutional framework, the result is egregious violation of property rights expressly stated in the Constitution. Government becomes the tool of business. The highest bidder wins the legislature’s favor. For example, after *Kelo*, private homes have been taken for shopping malls and small-scale businesses have been confiscated for more upscale businesses.¹⁵⁹ The Court’s current definition of public use makes all private property vulnerable to eminent domain because another private entity can always claim to make “better” use of the property.

To stop this attack on private property ownership, public use ought to possess a more narrow meaning and courts, including the

156. *Berman v. Parker*, 348 U.S. 26, 32 (1954).

157. *Id.*

158. *Bloodgood*, 18 Wend. at 63.

159. Petition for Rehearing at 2, *Kelo v. City of New London*, 545 U.S. 469 (2005) (No. 04-108); *e.g.*, *id.* at 2–7.

Supreme Court, ought to enforce that narrower meaning by performing more than a cursory review of takings.

B. Law (The What)

Limiting the scope of public use to the confines of the actual-use theory protects private property by erecting barriers to the government's exercise of its eminent domain power. An inherent tension exists between the individual's inalienable right to possess property and the state's traditionally-held power to take property in the name of all individuals. Mindful of that tension, the Framers of the federal Constitution included two requirements for the government to exercise eminent domain: 1) the taking must be for public use and 2) the condemnor must pay just compensation to the property owner. This Note has demonstrated the deterioration of the public use requirement and the resulting growth of the government's power to take. In light of the theory behind eminent domain and private property rights, this growth is unacceptable.

Man is not a caged prisoner of government, living at the government's mercy as to what property he may keep; instead, man ratified the Constitution to cage the necessary beast that is government so that government may only take man's property on man's terms. To stop and reverse the growth of the government's power to take, the public use requirement must have teeth once again to bite the government's hand when government inappropriately reaches beyond its limiting cage to take on its terms rather than on man's terms. Public use must, therefore, assume a more narrow meaning, and courts, the traditional guardians of constitutional limits on government, must review government action.

1. Giving Public Use Some Teeth

To reach a more narrow meaning of public use, public use should not include economic development alone or eliminating harm to the public. In terms of this Note's categories, this means that public use should not include category four or category five.

The problem with allowing category four is in defining harm to the public. A harm-to-the-public threshold imposes a dangerous subjective standard. Allowing a taking to eliminate harm to the public softens the public use requirement because legislatures and

municipal administrators have too much discretion to label things as harmful to the public.

Additionally, a category four taking to eliminate harm differs from a taking under categories one through three in an important way. A taking under the first three categories creates something for the public benefit where it did not exist before, such as a military base, road, or railroad. A category four taking based on eliminating harm to the public destroys a threat to the public well-being, such as removing blight, yet such a taking does not create anything for the public in its place.¹⁶⁰

Narrowing public use to categories one through three goes a long way to enforcing the constitutional limit on government. To enforce that narrow meaning, courts ought to assume a greater role in reviewing takings cases.

2. Courts Ought to Bite Back

The American system of government at the federal and state levels uses a separation of powers theory. The Supreme Court in *Marbury v. Madison* proclaimed that “[i]t is emphatically the province and duty of the judicial department to say what the law is,” establishing for courts the power of judicial review of legislative and executive actions.¹⁶¹ In light of the separation of powers theory and the Supreme Court’s own precedent, courts ought to determine independent of legislatures what qualifies as public use. This means that courts cannot shirk their responsibility to review proposed takings by other government actors. If courts fail to exercise judicial review in eminent domain cases, both limits imposed on eminent domain and the separation of powers theory fail.

The current standard that the Supreme Court requires for reviewing whether proposed takings satisfy the public use requirement is shameful and non-existent. The Court merely requires that the taking be “rationally related to a conceivable public purpose.”¹⁶² Such a standard transforms courts into rubber stamps for legislatures and municipal administrators because virtually every

160. See *City of Norwood v. Horney*, 110 Ohio St. 3d 353, 2006-Ohio-3799, 853 N.E.2d 1115, at ¶ 57.

161. 5 U.S. (1 Cranch) 137, 177 (1803).

162. *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 241 (1984).

taking possesses a *conceivable* public purpose.¹⁶³ At the very minimum, the Court should require a review of the public use requirement under the traditional rational basis test.¹⁶⁴ If the Court is unwilling to redefine public use, the Court should at least demand that the condemnor show that the taking is reasonably certain to result in certain public benefits.

Limits on government imply that some sort of judicial review will occur to ensure that government respects those limits. Limited government means that government may only act where the Constitution confers power on the government to act, and that the government has the burden of proving that the Constitution provides that it may act. Limits also mean that courts should resolve every doubt in favor of the property owner because the government, being one of limited power that possesses the burden of proof, must justify its action to the court's satisfaction. To follow this logic, consider, for example, a criminal case. In a criminal case, the prosecution bears the burden of proof beyond a reasonable doubt, and the defendant is presumed innocent until proven guilty. Every doubt should be resolved in favor of the defendant because the prosecution, possessing the burden of proof, must satisfy its burden of proof to the trier of fact's satisfaction.

Without the courts stepping in to enforce limits on government's power, the government possesses the unlimited power to redefine property rights—a power that the Constitution did not grant to the government.

C. Practice (*The How*)

1. Convince a Majority on the Court

Precedent offers little insight as to how narrow the justices on the Supreme Court are willing to interpret public use. Justice

163. For an amusing, yet startlingly actual debate over what is conceivable, see the footnote containing an oral argument transcript for *Alaska Central Express, Inc. v. United States* and accompanying text in Kanner, *supra* note 144.

164. To satisfy the rational basis test, the government's action must be "rationally related to a legitimate state interest." *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440 (1985). Despite Justice Kennedy's claim that the standard the *Kelo* majority adopted ("rationally related to a conceivable public purpose") echoes the rational-basis test, *Kelo v. City of New London*, 545 U.S. 469, 490 (2005) (Kennedy, J., concurring), the standard the majority adopted is much more deferential because the state interest must merely be "conceivable," and need not be "legitimate." See *supra* note 163.

O'Connor wrote an opinion in *Midkiff* for a unanimous majority, which included Justice Stevens and the late Chief Justice Rehnquist.¹⁶⁵ These three justices were willing to define public use as eliminating public harm (category four), but only Justice Stevens, who wrote the majority opinion for *Kelo*, showed himself willing to extend public use to economic development (category five).¹⁶⁶ Neither Chief Justice Rehnquist nor Justice O'Connor are currently on the Court, and Chief Justice Roberts and Justice Alito now fill their seats. The judicial records of the newest justices, however, do not determinatively indicate where either would draw the public use line. Justice Kennedy concurred in *Kelo*, but expressed that even under a rational-basis review, he would strike down a taking that intended to benefit "particular, favored private entities" with "incidental or pretextual public benefits."¹⁶⁷

Although public-use precedent gives little insight into how far justices are willing to narrow the definition of public use, precedent admittedly weighs against an actual-use interpretation (categories one, two, and three) through *Berman*, *Midkiff*, *Ruckelshaus*, and *Kelo*. To change the course of the Court's jurisprudence when faced with such adverse precedent, the Court must distinguish its precedent. The Court must find demonstrated differences between pending cases and precedent so that the Court can limit its application of the precedent's holding only to that precedent's facts.

This Note's categories provide a means of determining where differences lie. The difference between category four with *Berman* and category five with *Kelo*, for example, is that the *Berman* taking involved removing harm to the public, whereas the *Kelo* taking removed non-offending, non-harmful properties.¹⁶⁸ The difference between category three with *Cotton Duck* and category four with *Berman*, as another example, is that the category three taking creates something new for the public benefit (public utility) where it did not exist before, whereas the category four taking does not.

165. *Midkiff*, 467 U.S. at 231.

166. *See Kelo*, 545 U.S. at 470, 484–85 (majority opinion).

167. *Id.* at 490 (Kennedy, J., concurring).

168. *Compare Berman v. Parker*, 348 U.S. 26, 28–29 (1954) (describing the taken area as blighted), with *Kelo*, 545 U.S. at 475 (majority opinion) ("There is no allegation that any of these properties is blighted or otherwise in poor condition . . .").

Distinguishing precedent to narrow the reach of public use would go a long way towards restoring the Court's jurisprudential honesty. To be blunt, how can a majority on the Supreme Court unabashedly refuse to enforce a limitation on government explicit in the Constitution while having no problem enforcing other limits on government (termed rights rather than limits) not explicit in the Constitution?¹⁶⁹ If the Court is willing to grant protection to personal liberties, where specific textual limits on government's power is lacking, why does the Court refuse to grant such protection in enforcing specific constitutional limits to protect personal liberty interests in property, such as the public use requirement of the Takings Clause, that the Founders included for that purpose?

Although this Note has urged the Supreme Court to reconsider its decision in *Kelo* and narrow its interpretation of public use, private property rights are so important that this Note ought to consider other avenues of protection. Other means of seeking the protection of private property rights include lobbying federal and state executive and legislative representatives and qualifying and voting for ballot initiatives.

2. Lobby Representative Government or Qualify an Initiative for the Ballot

One need not rely on the Court, waiting for it to narrowly define public use and grant greater protection under the Takings Clause. Property owners can lobby federal, state and local elected officials, Congress, and local legislatures to accommodate themselves. Under our constitutional system, with the Constitution as the supreme law of the land, legislatures may not create laws less protective of individuals (granting the government greater power and infringing on

169. See, e.g., *Lawrence v. Texas*, 539 U.S. 558 (2003) (holding that a state cannot criminalize consenting same sex adults for engaging in sodomy in the privacy of their home); *Roe v. Wade*, 410 U.S. 113 (1973) (holding that the Due Process Clause affords women the right to choose whether to have an abortion); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (gathering penumbras of several rights within the Bill of Rights to explain how the right to privacy exists in the Constitution). This is not to say that the Court decided these cases incorrectly; this Note expresses no opinion as to that question. The function of these cases is to demonstrate that asking the Court to enforce stringent limits on the government is not something new or outrageous. See Kanner, *supra* note 144, for the disparate treatment of property owners seeking to have courts enforce their property rights and other litigants seeking to have courts enforce their personal rights.

individual liberties).¹⁷⁰ The Supremacy Clause, however, does not prevent a legislative body or an executive from providing individuals greater protection than the Constitution requires.¹⁷¹ At the federal level, the President signed an executive order and Congress has considered legislation to protect private property rights. Further, the people themselves could protect property rights by ratifying a constitutional amendment.

a. Federal eminent domain reform

President Bush responded to *Kelo* with an executive order to protect private property rights. The president's order allows the federal government to take private property only for public use and not to economically benefit private parties receiving the taken property.¹⁷² To clarify what the order means by public use, the president listed several situations where a taking is appropriate, including: 1) public ownership of the taken property, 2) exclusive use by the public of the taken property, 3) a project designed for public transportation, 4) a project designed for a public utility, 5) a transfer to a common carrier that will make the taken property available to the public as of right, and 6) a taking to eliminate public harm.¹⁷³ In terms of this Note's categories, President Bush's executive order permits a taking for categories one through four, but not for category five.

Within a few days after the Court announced *Kelo*, Congressman Sensenbrenner introduced a bill in the House that attacked the Court's decision.¹⁷⁴ The bill states its purpose on its face—protecting private property rights.¹⁷⁵ The House overwhelmingly passed the bill in November 2005 and referred the

170. See U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

171. See *id.*; *Kelo*, 545 U.S. at 489.

172. Exec. Order No. 13,406, 71 Fed. Reg. 36,973 (June 28, 2006).

173. *Id.*

174. See Private Property Rights Protection Act of 2005, H.R. 4128, 109th Cong. (2005).

175. *Id.* ("To protect private property rights.").

bill to the Senate.¹⁷⁶ Unfortunately for property owners, the Senate has not passed the House bill or the Senate counterpart.¹⁷⁷

Despite the Court's ruling that economic development is a valid public use for eminent domain, the House bill explicitly states that economic development cannot be a valid reason for the sovereign to exercise eminent domain.¹⁷⁸ The bill defines economic development as taking private property and conveying or leasing it to a private entity.¹⁷⁹ Economic development does not include transfers for public ownership (military base), transfers to an entity that makes the property available to the general public (railroad or public utility), transfers for a right of way open to the public (road), or transfers to remove harmful uses of land (blight removal).¹⁸⁰ In terms of this Note's categories, the House Bill allows the taking of private property for categories one through four, but not five.

The House bill addresses eminent domain abuse of state governments and the federal government.¹⁸¹ To limit states, the House relies on Congress's spending power.¹⁸² If enacted, the bill would refuse to disburse federal funds to a state using federal funds for state eminent domain projects premised on economic development.¹⁸³ Enacting the House bill would limit the federal government by forbidding Congress from using economic development as a reason to exercise eminent domain.¹⁸⁴ The bill contains an express private right of action so that private individuals can petition a court to enforce the bill's protective provisions.¹⁸⁵ The

176. News Advisory, U.S. House of Representatives Comm. on the Judiciary, House Overwhelmingly Approves Bipartisan Legislation Protecting Private Property Rights (Nov. 3, 2005), <http://judiciary.house.gov/media/pdfs/takingsHousepass11305.pdf>.

177. Press Release, Castle Coal., Senate Fails to Pass Eminent Domain Reform (Dec. 11, 2006), available at http://www.castlecoalition.org/media/releases/12_11_06pr.html. Senator James Inhofe introduced Senate Bill 3873 in September 2006. *Id.* For the text of the bill, see Private Property Rights Protection Act of 2006, S. 3873, 109th Cong. (2006).

178. H.R. 4128 §§ 2(a), 3. Congress cannot, however, redefine the scope of a constitutional right as defined by the Supreme Court. *Cf.* City of Boerne v. Flores, 521 U.S. 507, 519, 524 (1997).

179. H.R. 4128 § 8(1).

180. *Id.*

181. *See id.* §§ 2–3.

182. *See id.* § 2(a)–(b).

183. *Id.*

184. *Id.* § 3.

185. *Id.* § 4(a).

right of action provision also contains a fee provision permitting a prevailing plaintiff to recover attorney's and other fees.¹⁸⁶

Although federal legislation is more likely to occur than getting a constitutional amendment ratified, property owners could seek to ratify a new amendment to the federal Constitution. The Constitution, however, already contains an amendment on point; this Note begins by quoting the Takings Clause of the Fifth Amendment. Perhaps if that language is included in the Constitution *twice* the Court will take the public use limit on government's power of eminent domain more seriously.

For the newer version of the Takings Clause, however, rather than sticking with the same language, which a majority of the *Kelo* Court either had trouble understanding or fun playing with, add more. The new Takings Clause could read: "Private property shall not be taken for *public use*, without just compensation," and to borrow from Justice Thomas to be clear, "this is *not* the '[P]ublic [P]urpose Clause' and it is definitely *not* the 'Diverse and Always Evolving Needs of Society Clause.'"¹⁸⁷ If you are not sure what the Takings Clause of the Fifth Amendment means, the new Twenty-Eighth Amendment will tell you.

Given the stringent requirements to amend the Constitution,¹⁸⁸ it is unlikely that this country will ratify a new amendment for this purpose. However, in addition to these federal options, reform could occur at the state level. The *Kelo* majority emphasized that nothing precludes any state from restricting the government's power of eminent domain further than the federal baseline.¹⁸⁹

b. Eminent domain reform in the states

Both more convenient and effective than reform on the federal level, a state may limit government's power of eminent domain and protect private property rights through the state's constitution or through state statutes, or both. Several states limited eminent domain before *Kelo* and several have in response to *Kelo*. Some states have limited eminent domain through language in state constitutions or statutes nearly identical to the federal Takings Clause. Other states,

186. *Id.* § 4(c).

187. *Kelo v. City of New London*, 545 U.S. 469, 506 (2005) (Thomas, J., dissenting).

188. See U.S. CONST. art. V.

189. *Kelo*, 545 U.S. at 489 (majority opinion).

however, relied on state constitutional or statutory language more specific than the Takings Clause in the federal Constitution. South Carolina, Michigan, Oklahoma, Ohio, and Arizona have all defined public use for themselves and set decent examples for other states.

i. Similar language, different meaning

The takings clauses in the constitutions of both Michigan and Ohio are nearly identical to the federal Takings Clause.¹⁹⁰ Despite the textual similarities, the highest courts of both states interpreted their clauses more narrowly than the Supreme Court interpreted the federal Takings Clause in *Kelo*.

Before the U.S. Supreme Court decided *Kelo*, the high court in Michigan interpreted its takings clause as it applied to facts very similar to *Kelo*. In *County of Wayne v. Hathcock*, the county wanted to condemn defendants' non-blighted properties to construct a business and technology park that would generate millions in tax revenues and thousands of jobs.¹⁹¹ The Michigan Supreme Court granted more protection to property rights than the U.S. Supreme Court later granted in *Kelo*.

According to the Michigan Supreme Court, public use in the Michigan constitution does not absolutely bar transferring taken property to private entities.¹⁹² Public use does, however, absolutely bar transfers of property to private entities for *private* use. The court, therefore, limits transfers to private entities to three situations:¹⁹³ 1) where extreme public necessity requires it because the land can only be assembled by a government; 2) where the private entity receiving the property remains accountable to the public in its use of the property; and 3) where the government selects the property it transfers based on "facts of independent public significance," rather than on the interests of the private party getting the property.¹⁹⁴ In

190. Compare MICH. CONST. art. X, § 2 ("Private property shall not be taken for public use without just compensation . . ."), and OHIO CONST. art. I, § 19 ("[W]here private property shall be taken for public use, a compensation therefor shall first be made in money . . ."), with U.S. CONST. amend. V ("nor shall private property be taken for public use, without just compensation").

191. 684 N.W.2d 765, 770, 784 (Mich. 2004).

192. *Id.* at 781.

193. *Id.*

194. *Id.* at 783 (citing *Poletown Neighborhood Council v. Detroit*, 304 N.W.2d 455, 477–80 (Mich. 1981) (Ryan, J., dissenting)); see also *id.* at 781–83 (explaining in greater depth each situation where transfer to a private entity is appropriate).

terms of this Note's categories, the court allows a transfer to a private entity for 1) a category two road and a category three railroad, 2) a category three public utility, and 3) a category four blight removal.

After the U.S. Supreme Court decided *Kelo*, the Ohio Supreme Court considered the same issue the U.S. Supreme Court considered in *Kelo*—whether a city can take private property for economic development.¹⁹⁵ Specifically, the city wanted to take private property that the city determined was within an area not yet blighted, but that may deteriorate in the future.¹⁹⁶ The Ohio facts resembled *Kelo*'s facts, including non-blighted private property under attack, a city that has deteriorated in the last forty years, and a plan to redevelop the city and increase tax revenues.¹⁹⁷ The Ohio Supreme Court also considered language similar to the federal Takings Clause, and though not identical, the Ohio Constitution is no more specific in limiting the government's power of eminent domain than the federal Constitution.¹⁹⁸

While acknowledging that Ohio precedent allows the government to take blighted private property for redevelopment, the Ohio Supreme Court held that the taking of private property for economic development without blight does not satisfy the public use requirement in Ohio's Constitution.¹⁹⁹ Like the Michigan court, in terms of this Note's categories, the Ohio court allows a taking for some category four purposes, but not for category five purposes. The court, for example, stated that eliminating a land oligopoly does not satisfy Ohio's public use requirement,²⁰⁰ yet removing blight does.²⁰¹

Holding as it did, the Ohio Supreme Court refused to interpret Ohio's public use clause as broadly as the U.S. Supreme Court interpreted the federal public use clause because the Ohio Supreme Court preferred that the clause remain an essential limit on proposed

195. See *City of Norwood v. Horney*, 110 Ohio St. 3d 353, 2006-Ohio-3799, 853 N.E.2d 1115, at ¶¶ 8–9.

196. *Id.* at ¶ 8.

197. *Id.* at ¶¶ 9, 13–18.

198. See *supra* note 190.

199. *Horney* at ¶¶ 8–9, 59, 75, 75 n.12.

200. See *id.* at ¶ 65 (rejecting *Midkiff* as presenting a novel use of eminent domain law).

201. *Id.* at ¶ 59.

takings.²⁰² The Ohio Constitution, which contains protections for private property in addition to the public use requirement,²⁰³ clearly influenced the court when it decided not to allow government to exercise eminent domain unrestrained.²⁰⁴

These state cases suggest that the U.S. Supreme Court would not misinterpret the federal Takings Clause if it adopted a similar interpretation of public use to limit the government's power of eminent domain. Michigan's and Ohio's interpretations are valuable evidence that the federal Takings Clause can be the basis for a narrow meaning of public use. Other states provide examples of more specific constitutional and statutory language that suggest ways of drafting laws more protective of property rights.

ii. More specific language, greater protection

Unlike Michigan and Ohio with constitutional language similar to the federal Takings Clause, South Carolina, Oklahoma, and Arizona adopted constitutional provisions and statutes on eminent domain with language more specific than the federal Takings Clause. The specific language used in these three states either prohibited eminent domain for private use or defined acceptable public uses.

In *Georgia Department of Transportation v. Jasper County*, the county sought to condemn GDOT's property and lease it to a private company that would construct and operate a marine terminal.²⁰⁵ Although the marine terminal looks like a railroad for public use purposes, it differs in one significant aspect. While both the railroad and the marine terminal are transfers of private property to a private entity and both are gated facilities,²⁰⁶ the marine terminal lacks any general right of public access because access is limited to those steamship lines doing business with the company.²⁰⁷

Before the U.S. Supreme Court decided that economic development qualifies as a public use under the federal Takings

202. *Id.* at ¶¶ 65–66.

203. These protections include the very first section of the first article declaring that man's rights to acquire, possess, and protect property are inalienable rights. OHIO CONST. art. 1, § 1; see also *id.* art. 1, § 19 ("Private property shall ever be held inviolate, but subservient to the public welfare.").

204. See *Horney* at ¶ 68.

205. 586 S.E.2d 853, 854 (S.C. 2003).

206. *Id.* at 857; see *supra* note 24.

207. *Ga. Dep't of Transp.*, 586 S.E.2d at 857.

Clause, the South Carolina Supreme Court decided *Georgia Department of Transportation*. The South Carolina court held that economic development does not qualify as a public use under the South Carolina Takings Clause.²⁰⁸ Though the two constitutions contain the same Takings Clause language, unlike the federal Constitution, the South Carolina Takings Clause also expressly prohibits takings for private use.²⁰⁹ The South Carolina court explained that it limited the power of eminent domain to situations where the taking involves the public or public agencies possessing, occupying, and enjoying the taken property because eminent domain interferes with the owner's right to acquire, possess, and defend his property.²¹⁰

After the U.S. Supreme Court decided *Kelo*, the Oklahoma Supreme Court interpreted its statutory and constitutional law on eminent domain and reached a conclusion similar to the Michigan court's. An Oklahoma county urged the court to allow the taking of private property for economic development, including increased taxes, jobs, and public and private investment.²¹¹ In *Board of County Commissioners of Muskogee County v. Lowery*, the Oklahoma Supreme Court rejected the county's argument and decided that economic development *alone* is not a public purpose justifying the exercise of a county's power of eminent domain under Oklahoma's statutory and constitutional eminent domain provisions.²¹² In terms of this Note's categories, the Oklahoma court allowed takings under category four, but not under category five.²¹³

In reaching its holding, the Oklahoma Supreme Court considered its state constitutional provisions limiting eminent domain, which the court described as limits on the government's

208. *Id.* at 856. South Carolina's Takings Clause states that "private property shall not be taken for private use without the consent of the owner, nor for public use without just compensation being first made therefor." S.C. CONST. art. I, § 13.

209. Compare U.S. CONST. amend. V, with S.C. CONST. art. I, § 13.

210. *Ga. Dep't of Transp.*, 586 S.E.2d at 856.

211. *Bd. of County Comm'rs of Muskogee County v. Lowery*, 2006 OK 31, ¶ 15, 136 P.3d 639, 649.

212. See *id.* ¶¶ 11, 13, 136 P.3d at 647.

213. See *id.* ¶ 11 n.11, 136 P.3d at 647 n.11 (stating that no allegation existed that any of the subject properties were blighted). The court noted that its *Lowery* decision did not disturb its precedent holding takings appropriate for the combined purposes of blight removal and economic development. *Id.*

power, not grants of power.²¹⁴ The court explained that its constitutional provisions placed a more stringent limit on government's power of eminent domain than *Kelo*'s interpretation of the Takings Clause of the Fifth Amendment.²¹⁵ The court acknowledged, however, that the Oklahoma Constitution expressly forbids the taking of private property for *private* use unlike the federal Constitution.²¹⁶

As for the Oklahoma statutory provisions regarding eminent domain, the court adhered to a strict construction, "mindful of the critical importance of the protection of individual private property rights as recognized by the framers of both the U.S. Constitution and the Oklahoma Constitution."²¹⁷ In light of both the Oklahoma Constitution and statutes, the Oklahoma court reasoned that construing "public purpose"²¹⁸ broad enough to include economic development, as the U.S. Supreme Court has, abandons a limit on government, eliminates any distinction between public and private use, and deletes "public use" from the Constitution.²¹⁹

Arizona citizens recently approved a ballot initiative in response to *Kelo* that amends the state's statutory scheme covering eminent domain by limiting public use.²²⁰ Under the new law, Arizona allows the government to exercise eminent domain only for a public use.²²¹ Arizona defines public use to include: 1) a taking for the possession, occupation, and enjoyment of the public or public agency, 2) a taking for a public utility, 3) a taking to eliminate a direct threat of harm to the public, or 4) a taking of abandoned property.²²² In terms of this

214. *Id.* ¶¶ 9–10, 136 P.3d at 645–46. The Oklahoma Constitution declares that "[n]o private property shall be taken or damaged for private use, with or without compensation . . . except for private ways of necessity . . ." and [p]rivate property shall not be taken or damaged for public use without just compensation." OKLA. CONST. art. II, §§ 23–24.

215. *Lowery*, 2006 OK 31, ¶ 19, 136 P.3d at 651.

216. *Id.* ¶ 20, 136 P.3d at 652. Compare OKLA. CONST. art. II, § 23, with U.S. CONST. amend. V.

217. *Lowery*, 2006 OK 31, ¶ 11, 136 P.3d at 647.

218. Oklahoma law uses the terms "public use" and "public purpose" interchangeably when analyzing state constitutional eminent domain provisions. *Id.* ¶ 9, 136 P.3d at 646.

219. *Id.* ¶ 11, 136 P.3d at 647.

220. See Bruce Ramsey, *Despite Losses, Property-Rights Fight Is Far from Over*, SEATTLE TIMES, Nov. 15, 2006, at B6.

221. Private Property Rights Protection Act, ARIZ. REV. STAT. ANN. § 12-1131 (2007).

222. *Id.* § 12-1136(5) (defining public use).

Note's categories, the Arizona statute will allow takings for categories one through four, but not category five.

The constitutional and statutory language in these states provides examples of ways to draft or modify eminent domain law so that public use is more clearly defined.

VI. CONCLUSION

Public use as used in the Takings Clause of the Fifth Amendment can be divided into five categories, each progressively less public. The first two categories are consistent with the actual-use theory of public use, and demand that government take private property only for government ownership or use by the general public. The last two categories are applications of the public-benefit theory, which allows a taking of private property for a public benefit or a public purpose. The third category of railroad and public utility cases is the connecting point for the two theories as these cases apply the justifications of both theories.

In *Kelo*, the Court expanded public use so broadly that one questions whether public use imposes any real limit on the government's power of eminent domain. Future Courts should heed the words of the *Kelo* dissents before public use is effectively deleted from the Constitution. To the extent that the Court has already ignored public use, future Courts ought to reassess their precedent in light of the original import the Framers gave public use in designing our delicate system. The Court need not play with words. Public use should mean just that—use primarily by the public.

In addition to seeking a change of jurisprudence from the Court, lobbying representative government, both federal and state, offers other viable options to narrow the meaning of public use. South Carolina, Oklahoma, and Arizona provide examples of constitutional and statutory language that these states have adopted to protect property rights. Each of these states define public use more specifically and expressly forbid takings for *private* use. Defining public use more specifically is a reasonable means to protect property rights. It seems unnecessary, however, to adopt language that expressly forbids a taking for private use because current language that authorizes a taking allows only the taking for public use. Nonetheless, language expressly prohibiting private use takings

should be encouraged to curb abuse of property rights, regardless of how unnecessary it may seem. It *is* necessary.